OPINION
62-280

November 30, 1962 (OPINION)

WORKMEN'S COMPENSATION BUREAU

RE: Information in Claimant's File - Released Upon Claimant's Reques

This is in response to your letter of November 20, 1962, in which you state that the bureau has been confronted with the problem of releasing medical information submitted to the Workmen's Compensation Bureau by one or all of the attending physicians. In many of these cases, you state that there may be medical information submitted to the bureau that has no bearing on the claim itself.

You further state that the problem comes about when the claimant is dissatisfied with the bureau's award or determination and seeks legal counsel, at which point the attorney requests the bureau to furnish copies of the medical information in the claim file. This request is usually accompanied by a release of information executed by the claimant.

You then ask for an opinion whether it is mandatory upon the bureau to release all of the information in the file, or may the bureau refrain from releasing certain information if it pertains to matters such as social diseases or psychological problems which have no bearing on the claim. You further ask if it is mandatory to release the medical information to a private insurance company under these same facts.

In processing, evaluating and adjudicating claims, the bureau acts in a quasi-judicial capacity. Under section 65-02-11, certain authority is granted to the bureau. It also sets out how the bureau is to govern itself in the administration of its duties under title no. 65. The opening sentence warrants consideration, which provides as follows:

> * * * Process and procedure under this title shall be governed by the provisions of chapter 28-32 of the title Judicial Procedure, Civil.* * *."

The reference here is to the Administrative Agencies Practice Act, which was adopted by Chapter 240 of the 1941 Session Laws.

The Supreme Court of North Dakota had under consideration a case which dealt with the subject matter, wherein it held that where the bureau agrees to hear a claim, the claimant has the right, at proper times and places, to examine all of the files and records in his case. The case referred to is WALLIS V. NORTH DAKOTA WORKMEN'S COMPENSATION BUREAU, 60 N.D. 165 (284 N.W. 420), which was decided in 1939, and involved in a situation where the claimant was advised that his benefits were to be terminated. He then applied to the bureau for a further hearing. The bureau agreed to hold further hearing, at which time the claimant demanded to have access to the information in

his file to prepare for the hearing. The bureau refused his demand, whereupon mandamus proceedings were instituted.

In deciding the case, the trial court said, "Undoubtedly much of the record of the bureau is confidential so far as the public is concerned, but I do not think any testimony, oral, written, documentary or x-ray pictures used and considered in a case can be considered confidential as against the claimant." On appeal to the Supreme Court, the Court concluded that the foregoing statement is undoubtedly the law.

It is also significant to note that the decision of the Supreme Court was handed down in 1939 at a time when the Workmen's Compensation Act did not have the reference to chapter 28-32 as now found in section 65-02-11 of the North Dakota Century Code.

The law in effect at the time when the Court made its determination was paragraph f of section 4, as amended by Section 1 of Chapter 314 of the 1931 Session Laws. Paragraph f contained much of the present section 65-02-11, but made no reference to the Administrative Agencies Practice Act but to the contrary did provide that the process and procedure shall be as summary and simple as reasonably may be, and that the bureau shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure.

It is significant to note that the Court reached its conclusion in WALLIS V. NORTH DAKOTA WORKMEN'S COMPENSATION BUREAU under the provisions of paragraph f referred to above. Since the decision in the WALLIS case, the North Dakota Legislature created and adopted what is known as the Administrative Agencies Practice Act, which applies to the bureau as an administrative agency. The reference to such act in section 65-02-11 was made by the North Dakota Code Commission so as to fully implement and comply with the provisions of the Administrative Agencies Practice Act.

In addition to the foregoing, we must also consider the rule of law on due process in civil procedure, which applies to the bureau even though it is not bound by the technical rules. In doing so, we find that any objections relating to the examination or report of a physician may be considered on review if the question sought to be considered and determined was properly presented and saved below. (100 C.J.S., Section 700, page 1055.) This, in effect, means that if the claimant wishes to object to certain medical reports or examinations on review, he must do so before it reaches the Appellate Court. In order to make timely objections, he must know the contents of the examination or report. This means he must have access to such reports.

Also, ex parte statements or evidence cannot be considered by a board as evidence without first advising the party as to the nature of the evidence to be considered and be given the opportunity to contradict it or be given opportunity to submit other evidence to be considered. (100 C.J.S., Section 594, page 842.)

Generally, the right of cross-examination is preserved even though the board is not bound by technical rules of evidence or by common

law rules of evidence or formal rules of procedure. (100 C.J.S., Section 598, page 848.) By denying the right to such information would be denying the right to cross-examine.

Referring to the Administrative Agencies Practice Act, we find under section 28-32-06 that no information or evidence except such as shall have been offered and made by the official record shall be considered by the agency, except as otherwise provided. We are unable to find where it is otherwise provided on this subject matter. It follows that the claimant is entitled to know what is in the official record. For that matter, the bureau may consider only the evidence in the official record.

From the foregoing, it is our opinion that upon request by the claimant or the attorney of the claimant for information of medical examinations and reports or information in his file, it is mandatory upon the bureau to release such information to the claimant or his duly designated attorney. If such information is not made available to the claimant, under all of the rules of procedure and case law established, the bureau may not use such information in arriving at its determination. This would apply even though the information contained other material on social diseases or psychological problems.

It is our further opinion that the bureau is not under any obligation or mandatory duty to release medical information to a private insurance company. The bureau may do so if requested by the claimant or authorized by the claimant to release it. Upon proper release, this information, however, may be made available by proper judicial procedure and through process of subpoena.

Therefore, if the bureau is furnished any confidential information, and if the bureau uses or intends to use such information in determining the application of the claimant, such confidential information must also be made available to the claimant.

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